Supreme Court, U. S.
FILED
MAR 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1232

CHARLES JACKSON, et al.,
Plaintiff-Appellants,

vs.

S. I. HAYAKAWA, former president of
San Francisco State College, et al.,
Defendant-Appellees.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE DEUKMEJIAN
Attorney General
DERALD E. GRANBERG
Deputy Attorney General
MATTHEW P. BOYLE
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1395
Attorneys for
Defendant-Appellees

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

SUBJECT INDEX

	Page
Statement of the case	1
Introduction	1
Issues presented	3
Statement of the facts	3
First cause of action	3
(Mass arrest)	3
Second cause of action	4
(Purported blacklist)	4
I	
A court may take judicial notice of its own files or those of the district court	6
II	
As to the mass arrest (first cause of action) the court took judicial notice of Carmen Carrillo et al, v. S. I. Hayakawa, et al. Northern District of California No. C-50808	6
III	
The principles of res judicata/collateral estoppel bar the first cause of action	7
IV	
The entire proposed class was bound by the previous litigation	10
V	
Judgment of the pleadings and summary judgment is proper because there are no legitimate plaintiffs who have stated a claim on the second cause of action	15
VI	
Peter Pursley has not stated a claim in the second cause of action because of the Statute of Limitations and the underlying facts	17
VII	
Summary judgment was proper as to the fifth cause of action—student budget	21
Conclusion	25

TABLE OF AUTHORITIES CITED

Cases	Page
Aero Jet v. Askew, 511 F.2d 710	12
American Pipe v. Utah, 414 U.S. 538	12
American Surety Co. v. Baldwin, 287 U.S. 156	10
Andreadis v. Bd. of Trustees (1976) 59 Cal.App.3d 344	19
In Re Antibiotic Anti-trust Cases, 333 F.Supp. 296 (Southern District New York) affirmed 450 F.2d 1119 (2nd Cir. 1971)	14
Associated Students v. Trustees (1976) 56 Cal.App.3d 667	24
Baker v. Carr (1962) 369 U.S. 186	17
Baldwin v. Iowa State, 283 U.S. 522	10
Bishop v. Wood (June 1976) 426 U.S. 341	15
Blonder-Tongue v. University Foundation, 402 U.S. 313	12, 13, 14
Bd. Education v. Roberts, 48 L.Week 4035, 4041 (Nov. 28, 1979)	25
Bd. of Regents v. Roth, 408 U.S. 564	15
Bogacki v. Bd. of Supervisors, 5 Cal.3d 771	15
Boys Town v. Welchurch (9th Cir. 1965) 349 F.2d 576	9
Butz v. Economou 438 U.S. 478	24
Cambist Films, Inc. v. Duggan (3rd Cir. 1973) 475 F.2d 887	7, 8
Carrillo v. Hayakawa (No. District California 1969) No. 50808	2, 3, 4, 6, 7, 9, 10, 13, 14, 15, 17, 20, 21
Castro v. Beecher (1st Cir. 1972) 459 F.2d 725	13
Clarke v. Redeker (9th Cir. 1969) 406 F.2d 883	8
Collins v. United Air Lines, 514 F.2d 594	19, 20
Cream Top Creamery v. Dean Milk (6th Cir. 1967) 383 F.2d 358	9
Dombrowski v. Pfister (1965) 380 U.S. 479	2, 3, 9
Greenwood v. Peacock, 384 U.S. 808	17
Griffin v. Breckenridge, 403 U.S. 88	17
Hanna v. Plummer, 380 U.S. 460	18
Hansberry v. Lee, 311 U.S. 32	14
Harris v. Younger (1971) 401 U.S. 37	2, 3, 16

Cases	Page
Hatchitt v. U.S. (9th Cir. 1946) 158 F.2d 754	9
Imbler v. Pachtman, 424 U.S. 409	10
International Prisoners v. Rizzo (P.A. 1973) 356 F.Supp. 806	13
Jimenez v. Weinberger (1975) 523 F.2d 689	15
Laird v. Tatum (1972) 408 U.S. 1	16, 17
Lambert v. Conrad (9th Cir. 1952) 308 F.2d 571	6
Lau v. Nichols (9th Cir. 1973) 483 F.2d 791, reversed on other grounds 414 U.S. 563	13
Liberty Mutual v. Wetzel (3rd Cir. 1976) 508 F.2d 239, Cert. Denied 421 U.S. 1011	12, 16
Mabey v. Reagan (9th Cir. 1976) 537 F.2d 1036	19
MaChuck Moon v. Dulles (9th Cir. 1956) 237 F.2d 241	14
McCarthy v. Noren (9th Cir. 1967) 370 F.2d 845	9
McCormick v. Sullivan, 10 Wheat 192	10
Montana v. U.S. (1979) 440 U.S. 147	10, 12
Mount Healthy v. Doyle (1977) 429 U.S. 274	20
O'Shea v. Littleton (1974) 414 U.S. 488	16
Parklane Hosiery v. Shore 439 U.S. 322	10
Paul v. Davis (1976) 424 U.S. 693	16
Pierson v. Ray, 386 U.S. 547	10
Pettway v. American Cast Iron Pipe (5th Cir. 1974) 494 F.2d 211	13
Renn v. Smith (5th Cir. 1969) 410 F.2d 390	13
Rizzo v. Goode (1976) 423 U.S. 362	17
Ross v. Bernhard (1970) 396 U.S. 531	7
Sam Fox v. United States, 366 U.S. 683	14
Scheuer v. Rhodes, 416 U.S. 232	10
Senter v. General Motors (6th Cir. 1976) 532 F.2d 511	13
Sierra Club v. Morton (1972) 405 U.S. 727	17
Small Business Administration v. Taubman, 459 F.2d 991	8, 9

TABLE OF AUTHORITIES CITED

CASES	Page
Smith v. Lemon (9th Cir. 1971) 442 F.2d 1195	9
Stiltner v. Rhay (9th Cir. 1963) 322 F.2d 314	6
St. Paul Fire & Marine Insurance Co. v. Cunningham (9th Cir. 1958) 257 F.2d 731	6
Wetzel v. Liberty Mutual (3rd Cir. 1975) 508 F.2d 239	13
White v. Beal, 413 F.Supp. 1141	13
Wong v. Hayakawa (No. District California No. 50983)	2
Wood v. Strickland, 420 U.S. 308	10
Younger v. Harris, 401 U.S. 37	9
Zwickler v. Koota, 389 U.S. 241	9
Statutes	
California Education Code:	
Section 24053.7	23
Section 24301	19
Section 24315	19
California Evidence Code, section 201	6
28 U.S.C. Rule 23	12
Rules	
Federal Rules of Civil Procedure:	
Rule 2	7
Rule 23	11
Rule 23(A)	11
Rule 23(B)(1)	11, 15
Rule 23(B)(2)	11, 12, 13, 15
Rule 23(B)(3)	11, 14
Constitution	
United States Constitution, First Amendment	7, 9, 16, 20, 23
Texts	
2 Moores Federal Practice (2nd Ed.) No. 206, pp. 378 and 381	7
3(B) Moore's Federal Practice No. 23.55 p. 1152	12
18 U.S. Supreme Court Digest Lawyer's Edition pp. 50 and 52	12
Wright Federal Courts (2nd Ed. 1970) No. 67	7

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1232

CHARLES JACKSON, et al.,
Plaintiff-Appellants,

VS.

S. I. HAYAKAWA, former president of San Francisco State College, et al.,
Defendant-Appellees.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a Civil Rights case. The petition is from a judgment pursuant to Summary Judgment on all Five Causes of Action, the Ninth Circuit affirmed except as to one cause.

INTRODUCTION

The Ninth Circuit and Judge Schwarzer issued detailed orders granting summary judgment (See Appendix 1 and 2 of Petition). These decisions fully and concisely answer all questions raised by appellants herein. Our response therefore is mostly an application of the law as stated therein.

We asked the lower courts to take judicial notice of the files of *Carrillo v. Hayakawa* (No. District California No. 50808) and *Wong v. Hayakawa* (No. District California No. 50983).

This is a civil rights action arising out of the turmoil at San Francisco State University during 1969 and 1970. The defendants are or were various officials of the State College system. Plaintiffs attempted to have this matter determined as a class action.

In the First Cause of Action plaintiffs alleged that a mass arrest violated their constitutional rights; In the Second Cause of Action that a blacklist was prepared by the college because of their involvement in the strike and their arrests; In the Third Cause of Action that procedures for discipline set up by the college were improper; In the Fourth Cause of Action that events concerning the student elections of 1970 violated their rights; In the Fifth Cause of Action that certain allegedly discriminatory funding practices violated their rights. Appellants did not appeal from dismissal of their fourth cause of action.

After *Dombrowski v. Pfister,* 380 U.S. 479, 490 in 1965 and before *Harris v. Younger,* 401 U.S. 37 in 1971 the lower federal courts felt it proper to consider claims of bad faith enforcement of criminal statutes to prevent exercise of civil rights and they would actually enjoin state criminal proceedings. The *Carrillo* decision was during this period and turned *not* on a need to show irreparable injury, but on plaintiff's failure to prove bad faith.

ISSUES PRESENTED

1. Was the First Cause of Action (mass arrest) barred by the previous action of *Carrillo v. Hayakawa*—a three-judge federal court decision?

2. Was the Second Cause of Action barred by the Statute of Limitations?

3. Whether given the uncontradicted evidence that despite conflicting demands, plaintiff Black Student's Union was given a disproportionately great share of available funds, a cause of action can lie alleging more would be given absent racial motive.

STATEMENT OF THE FACTS

In the interests of coherence, we will present the facts as to each cause of action.

FIRST CAUSE OF ACTION
(MASS ARREST)

A mass arrest was made at San Francisco State College on January 23, 1969 by members of the San Francisco Police Department (C.T. 388). In an effort to stop the subsequent criminal trials some of those arrested filed a class action suit—*Carrillo v. Hayakawa,* No. District of California 1969, No. 50808. Because the events occurred between *Dombrowski* and *Younger,* a three-judge court was convened. The issues presented were not only the constitutionality on the statutes on their face, but also whether they were being enforced in bad faith. The court denied a temporary restraining order and after later submission of the case upon affidavits and parts of the criminal

trial transcripts denied, by written decision, the claims. (See *Carrillo* file or page 388, *et seq.* for the Judgment and Appendix 1. The *Carrillo* plaintiffs appealed to the United States Supreme Court, but after their request for a preliminary injunction was denied, allowed the appeal to lapse. In *Carrillo*, plaintiffs had never sought damages. Hayakawa was a defendant in the *Carrillo* action.

In *Carrillo*, the Public Defender filed an affidavit claiming to represent 400 of those arrested and later filed an amicus brief. (See Appendix 2) Other attorneys representing defendants also filed briefs or affidavits (See Appendix 3).

This present suit was filed on March 21, 1972, more than three years after the arrests (C.T. 1). It did not allege anything about these arrests (C.T. 1, *et seq.*) A First Amended Complaint was filed August 5, 1972. This also does not mention the mass arrest (C.T. 32, *et seq.*). The mass arrest *is* alleged in the Second Amended Complaint, February 19, 1975 (C.T. 217), six years after the arrests in question.

The court granted our motion for summary judgment as to the First Cause of Action—the mass arrest—by written order (C.T. 439, *et seq.*) on two alternate grounds —*res judicata* and the Statute of Limitations. The Ninth Circuit affirmed but considered only the res judicata ground.

SECOND CAUSE OF ACTION
(PURPORTED BLACKLIST)

In February, 1969, defendant Hayakawa issued a memo, attached to which was the police report of the mass arrest.

Plaintiffs allege this was a "blacklist." In the Third Amended Complaint, there were four named plaintiffs on this claim. Three alleged only fears as to future employment, plaintiffs conceded this was not enough and the court properly disregarded them (C.T. 443).

This left Peter Pursley as the only named plaintiff alleging actual loss of employment. The court found his action barred by the Statute of Limitations (C.T. 443).

The crucial facts are these:

(a) Pursley was informed March 12, 1969, he was not employed (Pursley Affidavit—C.T. 433).

(b) This suit was filed more than three years later (C.T. 1), and Pursley was not joined for an additional three years.

(c) Because he was rehired the next semester, no other violation could have occurred. Hayakawa answers to Interrogatory No. 9 (Answers pages 26, lines 12-17) filed September 17, 1973. (Documents 182-185 sent to the Court separately by the Clerk).

The court found the Statute of Limitations was not tolled because Pursley had no administrative remedy himself and that the grievance filed by another did not toll the statute (C.T. 443-444).

The evidence supporting this is in Document 103 (C.T. 438—unsuitable for transmittal). This consisted of an affidavit stating Pursley had no administrative remedy at the time in question. Attached were certain records as to the Pursley matter's chronology.

I

A COURT MAY TAKE JUDICIAL NOTICE OF ITS OWN FILES OR THOSE OF THE DISTRICT COURT

Evidence Rule 201—*Lambert v. Conrad* (9th Cir. 1952) 308 F.2d 571; *St. Paul Fire & Marine Insurance Co. v. Cunningham* (9th Cir. 1958) 257 F.2d 731, 732; and *Stiltner v. Rhay* (9th Cir. 1963) 322 F.2d 314, 316, fn. 6.

II

AS TO THE MASS ARREST (FIRST CAUSE OF ACTION) THE COURT TOOK JUDICIAL NOTICE OF CARMEN CARRILLO ET AL. v. S. I. HAYAKAWA ET AL. NORTHERN DISTRICT OF CALIFORNIA NO. C-50808

In the *Carrillo* case, *supra*, a class action was filed in the Northern District as to the very event here alleged in the first cause of action—plaintiffs therein sought an injunction and declaratory relief that the statutes under which the mass arrest was made were unconstitutional and the subsequent prosecution of these offenses was conducted in bad faith. A three-judge federal court issued a decision finding that the statutes were *not* unconstitutional on their face and further finding that the arrest and subsequent prosecution were being conducted in *good faith*. The court in the *Carrillo* decision did state that the action was filed not only on behalf of the named plaintiffs, but also on behalf of those similarly situated. A reading of part IV of the opinion (p. 9, *et seq.*) clearly shows that plaintiffs simply failed to prove their bad faith allegations on the merits.

We further asked the court to take judicial notice of two other types of material in the *Carrillo* file. The first type is the affidavits submitted by defendants in *Carrillo* and the partial transcripts of the criminal trial. The second type of material is the affidavits submitted by various attorneys who were representing the arrestees in the criminal proceeding. (See Appendix 3) We especially point to the affidavit submitted by the San Francisco Public Defender's office indicating that they were charged with representing about 400 of those arrested and seeking to file an amicus brief therein (March 11, 1969) (See Appendix 2).

III

THE PRINCIPLES OF RES JUDICATA/COLLATERAL ESTOPPEL BAR THE FIRST CAUSE OF ACTION

Federal Rule of Civil Procedure No. 2 provides that in Federal Court there is only one form of action. This abolished the old common law distinction between actions at law and actions at equity. See 2 Moores *Federal Practice* (2nd Ed. No. 206, pp. 378 and 381). Wright *Federal Courts* (2nd Ed. 1970) No. 67; *Ross v. Bernhard* (1970) 396 U.S. 531, 540.

In Federal law there is simply no right to split a cause of action.

The case closest to our own is *Cambist Films, Inc. v. Duggan* (3rd Cir. 1973) 475 F.2d 887. In *Cambist, supra,* the plaintiff had filed a suit for declaratory relief and for an injunction claiming a violation of First Amendment rights and prevailed. The First Amendment right in issue was the seizure of a film without a prior adversary hearing. Plaintiff subsequently filed a new suit for damages.

The Court of Appeals held that even though plaintiff had prevailed in the previous suit:

> "Where a plaintiff has had an opportunity to seek damages in its earlier action, its failure to combine all of its legal claims legal as well as equitable which could have been asserted and concluded in the earlier action is fatal and the county detectives were entitled to a judgment in their favor on the basis of the doctrine of *res judicata*. More, as stated by Prof. Moore where law and equity have been united and the litigant can present all his issues for relief whether legal or equitable, inconsistent, alternative, or hypothetical in a single action, he should be held to have but one cause of action and final judgment on the merits is *res judicata* as to all matters legal and equitable in support or defense of that cause of action. (One day in court is enough.)" "The plaintiff has had its fair day. Two of four principal defendants from the previous suit were named in the instant action. The previous complaint arose out of the same factual contact as the instant complaint." *Cambist, supra,* 890 and 891.

In *Clarke v. Redeker* (9th Cir. 1969) 406 F.2d 883, the court stated, "The judgment is conclusive not only as to matters which were decided, but also as to all matters which might have been decided." (Citations.)

In *Small Business Administration v. Taubman,* 459 F.2d 991, the Ninth Circuit stated:

> "*Res judicata* bars a suit on a cause of action which has been judicially determined on the merits on a prior suit involving the same parties or their privies. *Lawler v. National Screen Service Corp.*, 349 U.S. 322, 326; *Taubman's* counterclaim asserts the same cause of action asserted by his assignor Olympic in the *Colorado* case. Both claims are also in the same

> operative facts both sought to achieve the same objective. It does not matter that *Taubman's* legal theories of "conspiracy" and "joint ventures" between Joseph Newman and Newman Capital differ from the alter ego theory asserted by Olympic in the prior action." *Taubman, supra.*

A juggling of the parties does not change this result *Smith v. Lemon* (9th Cir. 1971) 442 F.2d 1195.

It therefore does appear to be well settled that a final judgment bars any subsequent action between the same parties based on the identical invasion of the same primary right—*McCarthy v. Noreen* (9th Cir. 1967) 370 F.2d 845, 847; *Boys Town v. Welchurch* (9th Cir. 1965) 349 F.2d 576, 578; *Hatchitt v. U.S.* (9th Cir. 1946) 158 F.2d 754, 755, as to all matters which were actually litigated and also as to those matters which *might* have been litigated in the former action. The action applies not only to actual parties but also their privies. *Cream Top Creamery v. Dean Milk* (6th Cir. 1967) 383 F.2d 358, 361.

It is clear from reading *Carrillo* that the court made a determination on the merits. As that decision makes clear, it was thought at that time that where First Amendment rights were alleged, allegations that statutes abridging such rights were void for vagueness, overbroad, or unconstitutional *as applied* stated grounds for a federal court to interevene in state prosecutions, *Dombrowski,* 380 U.S. 479, 490; *Zwickler v. Koota,* 389 U.S. 241. This was, of course, appreciably modified subsequently by *Younger v. Harris,* 401 U.S. 37.

The principle of *res judicata,* therefore, applies since bad faith was specifically involved. Damages could have

been sought, but were not. See also *American Surety Co. v. Baldwin,* 287 U.S. 156; *Baldwin v. Iowa State,* 283 U.S. 522; *McCormick v. Sullivan,* 10 Wheat 192.

The importance in *Carrillo* of the finding of a lack of bad faith is dispositive of the present action. For arrest situations in *Pierson v. Ray,* 386 U.S. 547; *Wood v. Strickland,* 420 U.S. 308; *Scheuer v. Rhodes,* 416 U.S. 232; and *Imbler v. Pachtman,* 424 U.S. 409, this Court has made quite clear that damages do not lie in a Civil Rights action unless the plaintiffs can in fact show bad faith. We submit the plaintiffs had their opportunity and failed to do so.

A short answer to the petition is that this Court has recently itself spoken on these issues in *Montana v. United States* 440 U.S. 147, 153-158 (1979) and *Parklane Hosiery v. Shore* 439 U.S. 322.

In *Montana, supra,* the United States was held bound by principles of collateral estoppel because it was involved in the state court litigation.

In *Parklane Hosiery, supra,* the results of a Securities Exchange Commission proceeding bound Parklane in separate civil actions.

IV

THE ENTIRE PROPOSED CLASS WAS BOUND BY THE PREVIOUS LITIGATION

We think it now clear and readily apparent that those bound by the *Carrillo* decision are in fact precluded by principles of *res judicata* from proceeding on the first cause of action. The next issue is whether the entire group can be considered bound. We respectfully submit that *Carrillo*

established a proper 23(B)(2) class and all were bound thereby regardless of notice.

Federal Rule of Civil Procedure No. 23 governs class actions. Provided that the four requirements listed in 23(A) were met, and obviously they were, a class is properly formed if *any* of the categories—B1, B2, and B3 are met. In this case, category B2 clearly applied and reads "The party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The class was also a proper B1 class in that "the prosecution of separate actions by or against individual members of the class will create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The Advisory Committee report explaining the 1966 amendment to Rule 23 makes quite clear the following rules:

A. That Subdivision B2 would apply unless the appropriate final relief relates exclusively or predominantly to money damages;

B. That in a B1 or B2 class action, the judgment describes the class and need not specify the individual as required in a B3 class action; and

C. That notice to a B1 or B2 class is discretionary with the court and is not required.

Where there is cohesiveness and unity in the class and the representation is effective, *notice tends toward the*

minimum. The Advisory Committee report can be found in 18 U.S. Supreme Court Digest Lawyer's Edition pp. 50 and 52. U.S. Code annotated Title 28 Rule 23 pages 298, 300 and 301-302. In 3(B) Moore's Federal Practice No. 23.55 at 1152, it is stated that:

> "There will be situations where the class is cohesive or where the legal relationship of the members enables one or more to stand in judgment for all and where the representatives are truly representative—a most important fact. In this situation, we suggest that although some notice to the members may be desirable and may be given—a judgment should be *res judicata* to the B1 and B2 situations where the requirements of Rule 23 have been satisfied."

Other than *Montana v. United States,* (1979) 440 U.S. 147, 153-158 the best exposition of the binding effect on a B2 class even when there is not notice is contained in *Liberty Mutual v. Wetzel* (3rd Cir. 1976) 508 F.2d 239.

Cert. Denied 421 U.S. 1011.

In *Aero Jet v. Askew*, 511 F.2d, the court stated at page 719:

> "Under the Federal law of *res judicata* a person may be bound by a judgment even though not a party, if one of the parties to the suit is so closely aligned with his interest as to be his virtual representative."

In *American Pipe v. Utah*, 414 U.S. 538, the court recognized that the old class action rule applied in 1966 was severely and justly criticized as it allowed one way benefits, and that the rule was therefore changed to bind both. Since *Blonder-Tongue v. University Foundation,* 402 U.S.

313, 322, *et seq.*, there is no longer any requirement that there be a mutuality of estoppel.

It has been clearly held that a class may exist despite noncompliance with a formal certification of the class. *Senter v. General Motors* (6th Cir. 1976), 532 F.2d 511, 520-522) citing with approval *Lau v. Nichols* (9th Cir. 1973) 483 F.2d 791, 793, reversed on other grounds 414 U.S. 563; and *Castro v. Beecher* (1st Cir. 1972) 459 F.2d 725, 731. Nor does a prayer for back pay affect the propriety of a B2 class *Pettway v. American Cast Iron Pipe* (5th Cir. 1974) 494 F.2d 211, 258. See also *International Prisoners v. Rizzo* (P.A. 1973) 356 F.Supp. 806; and *Renn v. Smith* (5th Cir. 1969) 410 F.2d 390; wherein it was held that the members of a B2 class were bound by the judgment despite their lack of notice. See also *White v. Beal,* 413 F.Supp. 1141, 1152; and *Wetzel v. Liberty Mutual* (3rd Cir. 1975) 508 F.2d 239, 254-257.

Moreover, we would submit that even under the old concept of privity plaintiffs are essentially foreclosed under the first cause of action for almost the entire class. An examination of the material in *Carrillo* shows most of the attorneys representing the defendants filed affidavits—thereby actively participating in the litigation—in an attempt to obtain the injunctive benefits.

The file in *Carrillo* reflects that the Public Defender's office filed an affidavit and an amicus brief. This declaration dated, March 11, 1969, states that the Public Defender's office was responsible for representing about 400 of the people arrested at the college on the day in question. Given that statement and the affidavits made by the attorneys rep-

resenting most of the other defendants—or so it seems—it is clear that almost the entire class of those arrested was in fact involved through their attorneys in the litigation in *Carrillo*. This is, accordingly, one more reason to give the judgment *res judicata* effect. Even in a B3 class action where notice is required, nonparties were held bound if an attorney on their behalf had participated. See *In Re Antibiotic Anti-trust Cases*, 333 F.Supp. 296 (Southern District New York) affirmed 450 F.2d 1119 (2nd Cir. 1971). See also *Hansberry v. Lee*, 311 U.S. 32, at 42-43; *Sam Fox v. United States*, 366 U.S. 683, 691.

In summary then since the claim for damages could have been made in the initial lawsuit of *Carrillo*, a suit for damages based upon the identical fact situation may not now be considered. Moreover, we submit the entire class was in fact bound by *Carrillo* regardless of whether they had notice or not. In any event given the participation by attorneys for the various defendants, they would be bound under the old concepts of privity. Also since *Carrillo* found for defendant *Hayakawa* on the issue of good or bad faith and bad faith is essential to recovery of damages, we submit we are entitled to summary judgment as to the first cause of action. The essential privity between the defendants was obviously present—though since *Blonder-Tongue, supra,* has now abolished the concepts of mutuality of estoppel, privity is not required for the other defendants to claim the benefits of *Carrillo* themselves. See also *MaChuck Moon v. Dulles* (9th Cir. 1956) 237 F.2d 241, 243.

The supposed lack of certification is not vital. The Ninth Circuit characterized it, in this instance, as a meaningless requirement since all parties in *Carrillo* treated it as a class

action and the decision refers to the fact that the suit was filed on behalf of all those similarly situated. It is difficult to imagine a situation were the "mass arrest" here would not constitute a proper class action. Obviously if plaintiffs had prevailed all criminal proceedings would have been enjoined.

The Seventh Circuit Court of Appeals in *Jimenez v. Weinberger,* (1975) 523 F.2d 689 determined that certificate of class even after a judgment was not crucial in Rule 23(B)(1) or (B)(2) cases. That reasoning is applicable here.

V

JUDGMENT OF THE PLEADINGS AND SUMMARY JUDGMENT IS PROPER BECAUSE THERE ARE NO LEGITIMATE PLAINTIFFS WHO HAVE STATED A CLAIM ON THE SECOND CAUSE OF ACTION

A fair reading of the complaint (paragraphs 44 to 56) shows plaintiffs allege that as a result of the mass arrest, a "blacklist" was prepared. *If* the allegations related only to the initial act, the finding in *Carrillo* that there was no bad faith shown would be dispositive. The fact of "good faith" would extend to cover the act of not employing those who were thought to have acted in violation of law—there is no absolute right to government employment. *Bishop v. Wood* (1976) 426 U.S. 341; *Bd. Regents v. Roth,* 408 U.S. 564; *Bogacki v. Bd. of Supervisors,* 5 Cal.3d 771.

A refusal to hire those thought guilty of criminal acts, especially where good faith via *Carrillo* is conclusively established, would be dispositive.

Plaintiffs, however, have alleged that a list is still effectively in existence. Our approach therefore was to zero in upon the actual plaintiffs and show they had not stated a claim—except as to one whose claim is barred by the Statute of Limitations—and the actual facts.

It is, of course, clear that one cannot be a fit representative unless he is a member of the injured class, *O'Shea v. Littleton* (1974) 414 U.S. 488, and this applies to those whose claims are barred by a Statute of Limitations. *Liberty Mutual v. Wetzel* (3rd Cir. 1976) 508 F.2d 239, 246.

There were four named plaintiffs. Three of them: Daniels, Simmons and Green—alleged (Par. 49) only that their names appear on a blacklist and they "believe they are in jeopardy of being denied future employment." They had thus not shown an injury and lacked standing.

In *Harris v. Younger* (1971) 401 U.S. 37, 41-42, an allegation of fear of criminal prosecution over a First Amendment Right was held not enough.

In *Paul v. Davis* (1976) 424 U.S. 693, the court held that putting a person's name on an "active shoplifters" list, absent loss of employment failed to state a claim under the Civil Rights Law. The Civil Rights Act does not embody the entire body of tort law.

In *Laird v. Tatum* (1972) 408 U.S. 1, 13, the court held that parties investigated by the Army, which developed intelligence files, failed to state an actual claim. The court also held that they lacked standing as by bringing the suit

they *refuted* that they were afraid to exercise their rights. *Laird* (fn. on page 13-14).

See also *Sierra Club v. Morton* (1972) 405 U.S. 727, 738; *Baker v. Carr* (1962) 369 U.S. 186, 204; *Rizzo v. Goode* (1976) 423 U.S. 362, 372; *Greenwood v. Peacock,* 384 U.S. 808; *Griffin v. Breckenridge,* 403 U.S. 88, 101-102 (1972).

We therefore asked judgment as to the three plaintiffs alleging neither actual employment nor actual injury. *Plaintiffs conceded as to them.*

VI

PETER PURSLEY HAS NOT STATED A CLAIM IN THE SECOND CAUSE OF ACTION BECAUSE OF THE STATUTE OF LIMITATIONS AND THE UNDERLYING FACTS

The only remaining plaintiff in the second cause of action would be Peter Pursley. As to him the complaint alleges that he was on the "blacklist"; was an instructor in Fall, 1968; was not rehired for Spring, 1969 because of the "blacklist"; did teach but was not paid (Par. 50, *et seq.*). Since he would be bound by *Carrillo* on the issue of "good faith" absent a civil service right he therefore had no rights of reemployment.

Moreover, since the injury alleged relates to the *Spring* of 1969, his claim is barred by the applicable Statute of Limitations. Absent special provisions (such as those relating to a Title VII action) the applicable Statute of Limitations is determined by reference to *State* law—

there being no Federal rule. *Hanna v. Plummer,* 380 U.S. 460 at 470.

While this action was filed on March 21, 1972, he was not a named plaintiff until December, 1975, six years after the fact. Plaintiff Pursley is therefore barred and there would therefore be *no plaintiffs* who can sue.

Pursley's affidavit on its face claims he was told he was not approved for rehiring on March 12, 1969 (433). The complaint was filed on March 21, 1972—more than three years later.

Plaintiff makes the argument that an "administrative remedy" tolled the Statute. *Pursley, however, did not file a grievance as he had no such right.* (See Garrity's Affidavit—Document 103). A grievance was filed by the Chairman of the Department of Psychology. This, however, was not a remedy available to Pursley nor did he have to exhaust it.

The *Hayakawa* Interrogatories I(F) provided:

> "Whether there existed and/or exist any memorandum/a, letter/s and/or list/s issued by your staff, your office, and/or its representative/s with respect to the ineligibility for college employment of person/s having no affiliation with the college. (i.e., Peter Pursley, Dr. Carlton Goodlet, etc.)"

Plaintiffs now desire to have Pursley considered a full faculty member. This is totally contrary to the facts they impliedly admit. Attached to #103 is correspondence from Dr. Rauch—who did file the grievance. This shows (in the March 10, 1969 memo) Pursley was a graduate student at Stanford.

The chronology from Rauch dated June 3, 1969 shows Pursley was told by Rauch on *February 27*, that he would not be hired because of the arrests.

Finally, the letter of April 11, 1969 from Dollard to Rappe shows his version of the incident.

It is clear that under the initial directive Pursley would not have been hired unless the special committee granted him an exception. It is further clear that Pursley's involvement in an incident on February 14, not only the mass arrest, was the reason Dollard refused him an exception.

We point not only to Dr. Garrity's affidavit, but also Education Code section 24315 adopted in 1975.

This provided for the first time, an administrative remedy for people such as Pursley—*hired for one semester, question of reappointment.* See also former Education Code section 24301.

It is thus clear that at the time in question—1969 Pursley had no administrative remedy.

Prior to this bill even probationary faculty could be terminated by a nonretention decision and there was no administrative remedy available. *Mabey v. Reagan* (9th Cir. 1976) 537 F.2d 1036, 1042-44 and *Andreadis v. Bd. of Trustees* (1976) 59 Cal.App.3d 344.

Plaintiffs are evidently still claiming that because another's grievance was not finally denied until August, the Statute did not run.

It is, however, the supposed *act*—the issuing of the initial memo that started the Statute. In *Collins v. United*

Air Lines, 514 F.2d 594, the Court of Appeals was faced with a similar situation. The stewardess there alleged a "continuing violation" and the Court rejected this theory.

The above, of course, does not affect the independent ground that "good faith" having been proved in *Carrillo*, Pursley cannot object to the initial memo; having been hired the *very next* semester.

In summary then appellant agreed that three named plaintiffs have not stated a case. As to Mr. Pursley, *Carrillo* prevents an initial finding of bad faith and the Statute—three years has run.

We think in justice that appellants should not be allowed to try again. The arrest in question occurred in January, 1969—when Max Rafferty, Lt. Governor Reinecke and Governor Reagan were in office; Mr. Lynch was Attorney General and Hayakawa had not yet retired and gone to the United States Senate. A true insight into the change of circumstances is that Richard Nixon had only just become President.

A new class action does no one any favors. In *Mount Healthy v. Doyle* (1977) 429 U.S. 274, the Supreme Court has made it quite clear that the exercise of even a First Amendment right should not place one in a better position than we would have been without it. Thus, *even if* First Amendment conduct played a substantial part in a decision, if the decision would have been made anyway there is no relief due. The Court envisions a procedure where a party proves protected First Amendment conduct played a substantial part; the agency can show it would have

acted in any event. The issue is contemplated to be raised in *individual* cases, not as a useless exercise in futility.

As a second independent ground for summary judgment we incorporated our Answers to Interrogatory No. 9 (Answers p. 26, lines 12-17) Hayakawa filed September 17, 1973. This shows he *was* employed for the *Fall Semester* of 1969. There could hardly have been a blacklist as to him as he was hired. On the decision in *Spring* 1969, he would be bound by the "good faith" finding of *Carrillo* and the Statute of Limitations.

A third ground for the nonexistence of a "blacklist" exists in Hayakawa's Answer to Interrogatory (Hayakawa p. 1[illegible] filed September 17, 1973). This refers to Exhibit 3 attached thereto. This shows a number of people from the "blacklist" were hired *after* the effective date thereof.

VII

SUMMARY JUDGMENT WAS PROPER AS TO THE FIFTH CAUSE OF ACTION—STUDENT BUDGET

The order as to the issue was as follows:

"The fifth claim is brought by various individual plaintiffs, and alleges that the Black Students Union (BSU), because it was active in the campus activities of 1969-1970, was budgeted inadequate funds to pay the salaries of all those it had hired. Respondents have shown that i) the demands for money by various groups exceeded available funds; ii) that various minority groups, including the BSU, received funds; and iii) that the BSU received much more than most groups, and in fact received a disproportionately large share of available funds. Accordingly,

there is no evidence that the BSU, which received proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its "expectations" might have been and what promises might have been made. (CT 447.)"

The evidence fully supporting these statements is contained in the Answer of Harkness and Deland (Documents 182 to 184 transmitted separately by the Clerk). The details are in voluminous record exhibits.

The basic thrust of our motion was that the mere expectancy of a benefit to which a plaintiff is not entitled cannot create a cause of action *regardless of motivation,* on the facts alleged here.

Plaintiffs complaint (#90) admits that Black Students Union received an appropriation approved by Hayakawa. The allegation is that *but for his motivation,* they would have received more.

The exhibits attached to Interrogatories show how many political and ethnic groups existed at San Francisco State and that most received Student Funds. Hayakawa could, under plaintiffs theory, be liable to each group and those expecting benefits from it upon the mere allegation that he had an evil motive.

If plaintiffs have stated a cause of action consider the consequences:

(a) City of San Francisco Public Works is sued for failure to fix streets or lights in Hunter's Point; or Mission; or Fillmore; or Chinatown, where sufficient money *was* used but allegation is *more* would have been spent but for racial motive;

(b) State Scholarship Commission is sued where funds are advanced to minorities *but* allegation in that *more* would have been advanced but for racial motive;

(c) H.U.D. makes local grant for Hunter's Point but is sued on allegations that, but for racial motive, more would have been appropriated.

Since every political and racial minority can file and, caucasians can allege reverse discrimination, if plaintiffs succeed, *every* person may sue on whatever he may dislike merely alleging race, religion, or a decision based on exercise of First Amendment violations.

We submit therefore that the underlying purposes behind the "immunity," "political question," and "standing" rules are based at preventing the very type of complaint filed here. Every governmental official could, under plaintiffs theory, be assured of a civil rights suit by the dissatisfied party.

What plaintiffs are really now contending is that Hayakawa denied a *preference* based on race for a racial motive. The simple answer is that plaintiffs had no right to a racial preference. Hayakawa *approved* the sum of $3,500.00 —much more than others received—for the Black Students Union. The next entry is their tutorial program. This received $7,500.00. Given these sums summary judgment was correctly granted.

Education Code section 24053.7 gave to the President power over student appropriations and expenditures. This was enacted mainly because of the profligate diversions of

funds at San Francisco State to a small group of radicals in the form of grants in aid.

Associated Students v. Trustees (1976) 56 Cal.App.3d 667, recognizes the President's broad power.

The case makes clear that the defendants had both the right and duty to insist money be spent properly *and* expended when necessary.

Plaintiffs allege that in refusing to permit student funds to be spent for their comfort and support, Hayakawa somehow discriminated against them. We submit they are not entitled to special favors. They are not entitled to appropriate for their own use funds extracted from others for the benefit of all.

It is difficult to attack the foundation of an argument which rests upon nothing in the record. The "affidavits" so often referred to by petitioner *were not before the Courts below*. They had initially been attached to the initial complaint, but the complaint had been dismissed and the affidavits were ordered *not to be used* as part of any amended complaint. (C.T. 49). No reference was made to them before the District Court and no reference before the Ninth Circuit—they were not only *not* part of the record on appeal but also *not* even mentioned in appellants briefs before the Ninth Circuit.

In *Butz v. Economou,* 438 U.S. 478, 508 this Court decided, by a 5-4 vote, absolute immunity was not required for high level federal officials. Part of the rationale was that a lower court would grant summary judgments and that plaintiffs could not play "dog in the manger."

We submit that our statistical data showing so much having been paid shifted the burden of proof to the plaintiffs. *Bd. Education v. Roberts,* 48 L.Week 4035, 4041 (Nov. 28, 1979) and that plaintiffs failed to challenge this evidence before the District Court or the Court of Appeals. Plaintiffs attempt to create a factual conflict only before this Court itself.

CONCLUSION

We respectfully submit the petition for certiorari should be denied.

Dated: March 10, 1980

GEORGE DEUKMEJIAN
Attorney General of the State of California
DERALD E. GRANBERG
Deputy Attorney General

MATTHEW P. BOYLE
Deputy Attorney General
Attorneys for
Defendant-Appellees

(Appendices Follow)

Appendices

Appendix A

In the United States District Court
for the Northern District of California

No. 50808

Carmen Carrillo, James P. Queen, Regino S. Montes, Gary F. Barr, D. Joseph Beresford, Joshua Leeds through Sharon Leeds, his guardian ad litem, and on behalf of all others similarly situated,

Plaintiffs,

vs.

S. I. Hayakawa, Acting President of San Francisco State College, individually and in his official capacity; Thomas J. Cahill, individually and as Chief of Police of the City and County of San Francisco; and John J. Ferdon, individually and in his official capacity as District Attorney of the City and County of San Francisco, and their agents, employees, and successors in office,

Defendants.

[Filed June 27, 1969]

MEMORANDUM AND ORDER FOR JUDGMENT

WEIGEL, J.

This case arises out of the turmoil at San Francisco State College last winter. For many weeks, students, fac-

ulty members and others organized rallies, conducted demonstration and picketed on or near the campus. These activities were pursued in support of demands for various changes in college programs and policies. Campus life was disrupted. Police were often called. Arrests and threats of arrest were frequent. Property damage and violence punctuated the turmoil.

The plaintiffs, who sue on behalf of themselves and others similarly situated, were arrested during the course of these troubles. They complain particularly of the mass arrest on January 23, 1969. On that date, many people gathered for a rally on the campus commons in disregard of orders issued by defendant Hayakawa, the Acting President of the college. The authorities announced to those assembled that they were participating in an unlawful assembly and ordered them to disperse. Shortly thereafter members of the San Francisco Police Department encircled and arrested approximately 450 persons. Those arrested were charged with violating California Penal Code § 408 (participation in an unlawful assembly or rout), § 409 (refusal to disperse from the place of an unlawful assembly, rout or riot), and § 415 (disturbing the peace). An "unlawful assembly" is defined by § 407. Expedited prosecutions are proceeding in the state and city courts.

The complaint herein seeks a declaratory judgment striking down California Penal Code §§ 407, 408, 409 and 415 as unconstitutional on their face or a declaratory judgment holding that those statutes and others have been enforced unconstitutionally for the purpose and with the effect of discouraging free speech and assembly. Plain-

tiffs also seek preliminary and permanent injunctions restraining the defendants from enforcing both the challenged statutes and certain college regulations as well as from interfering with the exercise of various claimed constitutional rights.

The attack on the wording of the statutes focuses on the following language:

> § 407. Whenever two or more persons assemble together to do an unlawful act . . . or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.
>
> § 415. Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor, . . .

Plaintiffs urge that the quoted provisions are unconstitutionally vague and overbroad in that they proscribe activities protected by the Fourteenth Amendment as it "incorporates" the First.

Plaintiffs properly rely upon 28 U.S.C. §§ 1343(3), (4) as giving this court jurisdiction over the suit they bring under the sanction of 42 U.S.C. § 1983. On March 14, 1969, this three-judge court, convened pursuant to 28 U.S.C. §§ 2281, 2284, denied a motion for a temporary order restraining the prosecution of plaintiffs, and members of their class on charges arising out of the January 23 arrests. The plaintiffs have now moved for a declaratory judgment that the state penal statutes are unconstitutional on their face, a declaratory judgment that said statutes have been applied in bad faith for the purpose and with the effect of discouraging the exercise of the rights of speech and assem-

bly, and a declaratory judgment that certain regulations promulgated by defendant Hayakawa are unconstitutional restrictions of constitutional rights. If any or all said judgments should be granted, plaintiffs also seek a preliminary injunction against various types of harassment, arrests, and prosecutions.

I.

Defendants urge the court to abstain in this matter on the ground that those prosecuted under state penal statutes should first seek protection of their constitutional rights in the state courts.[1] We decline to abstain. *See Davis v. Francois,* 395 F.2d 730, 732 (5th Cir. 1968); *Heard v. Rizzo,* 281 F. Supp. 720, 728, 738 (E.D. Pa.), *aff'd,* 392 U.S. 646 (1968); *Landry v. Daley,* 280 F. Supp. 938, 946-49 (N.D. Ill.), *prob. juris. noted sub nom. Boyle v. Landry,* 393 U.S. 974 (1968) (No. 244); *appeal on other question dismissed sub nom. Landry v. Boyle,* 37 U.S.L.W. 3208 (U.S. Dec. 10, 1968).

"Civil rights" are particularly deserving of prompt protection by the federal courts. *See McNeese v. Board of Education,* 373 U.S. 668, 671-72 (1963). Abstention is disfavored in cases justifiably attacking state statutes as being unconstitutionally "vague" or "overbroad" regulations of First Amendment freedoms. *See Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Zwickler v. Koota,* 389 U.S. 241 (1967). While the attacks made by plaintiffs on the California statutes may not prevail, they raise serious questions which merit consideration. The challenged statutes appear on their face to deal with speech and assembly in sweeping terms. Similar statutes and ordinances have been declared unconstitutional by other three-judge courts on grounds urged by plaintiffs here. *University Comm. to End the War in Viet Nam v. Gunn,* 289 F. Supp. 469 (W.D. Tex.), *prob. juris. noted,* 393 U.S. 819 (1968); *Landry v. Daley, supra,* at 955; *Carmichael v. Allen,* 267 F. Supp. 985, 997-98 (N.D. Ga. 1967). Affidavits submitted by the plaintiffs indicate that the expression of opinions on the campus of San Francisco State College may have been inhibited by the vigorous enforcement of the challenged statutes.

[1]For a thorough analysis of the abstention doctrine, *see* Note; *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L. REV. 604 (1967).

These factors are not outweighed in this case by considerations normally favoring abstention—considerations such as leaving state law questions to state courts, avoiding unnecessary or premature decisions on the constitutionality of state statutes and minimizing conflict between state and federal governments. *Compare Dombrowski, supra, and Zwickler, supra, with Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941). Therefore, we proceed to consider the merits of the plaintiffs' motions.

II.

Section 407 of the California Penal Code defines two circumstances constituting an "unlawful assembly": assembling "to do an unlawful act" and assembling "to do a lawful act in a violent, boisterous, or tumultuous manner." As to the former, the plaintiffs contend that the term "unlawful act" encompasses the gamut of criminal *and civil* wrongs and, therefore, is both overbroad and susceptible of arbitrary enforcement. This was the ground for holding an almost identical statute unconstitutional in *Lan-*

dry v. Daley, supra, at 955. That court felt that " 'unlawful act' in its normal meaning . . . includes city regulatory ordinances, quasi-criminal ordinances, torts and other civil wrongs." *Id.*

We cannot agree. In the context of § 407, we are satisfied that "unlawful act" refers to criminal conduct prohibited by state law and that the average reader would so understand. This is the only interpretation given that phrase by the California state courts. *See Coverstone v. Davies,* 38 Cal. 2d 315, 239 P.2d 876 (1952) ("hot-rod" racing punishable by both fine and imprisonment); *In re Bacon,* 240 Cal. App. 34, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966) (illegal occupation of a college building); *People v. Anderson,* 117 Cal. App. 2d 763 (Super. Ct., App. Dep't 1931) (obstruction of public traffic). Construed in this manner, the first part of § 407 is neither "vague" nor overbroad nor unduly susceptible of arbitrary enforcement.

Plaintiffs' second attack on § 407 focuses on its prohibition against doing lawful acts in a "boisterous" or "tumultuous" manner. Although on its face such language may raise constitutional questions, *see, e.g., Carmichael v. Allen, supra,* at 998, this portion of the statute has been construed in a manner which comports with constitutional standards. In *People v. Kerrick,* 86 Cal. App. 542, 551-52, 261 P. 756, 759-60 (Dist. Ct. App. 1927), referring to § 407, the state court held:

> Not every meeting where violent, boisterous and tumultuous conduct occurs may be denominated an unlawful assembly. . . . The statute was intended to prevent "any tumultuous disturbance of the public peace by" two or more persons "having no avowed,

> ostensible legal or constitutional object assembled under such circumstances and deporting themselves as to produce danger to the public peace and tranquillity, *and* which excites terror, alarm *and* consternation in the neighborhood."
>
> (ciations omitted; emphasis added).

The court further specified that within the meaning of the statute, "terror" arises when

> "rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety, and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done."
>
> *Id.* (citation omitted).

The referenced language of § 407 purports to reach *only* those assemblies characterized by "violent, boisterous, or tumultuous conduct". It does not interfere with any peaceful gathering simply because it may develop into or precipitate a public commotion. *Kerrick* narrowly defined the illegality of any such assembly in terms of *both* purpose *and* effect. Thus, the statute reaches only those assemblies which are outwardly unruly and which, without any professed or apparent legal objective, excite fear and unrest in the community. Such an interpretation brings § 407 within constitutional bounds.

The finding that § 407 is constitutional makes it unnecessary to examine §§ 408 and 409 because the attack on those statutes was based upon the alleged unconstitutionality of § 407.

III.

The challenge to § 415 of the California Penal Code is aimed at the language:

> Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . .[2]

Plaintiffs urge that this provision is unconstitutionally "vague" in that it does not delineate an ascertainable standard of conduct and is impermissibly "overbroad" in that it embraces forms of expression which are constitutionally protected. Therefore, they contend, that portion of §415 is void *per se*.

In recent years, similar codifications of common law "breach of the peace" and "disturbing the peace" doctrines have been under steady siege, both successfully, *e.g., University Committee to End the War in Viet Nam v. Gunn, supra,* and unsuccessfully, *e.g., Heard v. Rizzo, supra.* The question raised is a difficult one. The state clearly has a legitimate need for a "catch-all" statute prohibiting those excesses of behavior which cannot be predicted and proscribed with particularity. Yet, such a provision by its very nature regulates certain forms of speech and assembly in sweeping and indefinite terms. The Supreme Court has occasionally found such statutes unconstitutional *as applied* to peaceful activities, but it has not clearly ruled on whether they are facially unconstitutional under due

[2]"Maliciously" is defined by § 7(4) of the Penal Code as importing "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

process standards. *See Brown v. Louisiana,* 383 U.S. 131 (1966); *Cox v. Louisiana,* 379 U.S. 536 (1965); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); Note *Regulation of Demonstrations,* 80 HARV. L. REV. 1773, 1783 (1967).

We believe that the proper approach to this question is that outlined by Mr. Justice Harlan in his concurring opinion in *Garner v. Louisiana,* 368 U.S. 157, 185 (1961):

> No one can deny the interest that a State has in preserving peace and harmony within its borders. Pursuant to this interest, a state legislature may enact . . . a disturbance of the peace statute which either lists in detail the acts condemned by legitimate state policy or proscribes breaches of the peace generally, thus relating the offense to the already developed body of common law defining that crime. Or it may . . . append to a specific enumeration in a breach of the peace statute a "catch-all" clause to provide for unforeseen but obviously disruptive and offensive behavior which cannot be justified, and which is not within the range of constitutional protection.
>
> But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Cantwell v. Conn., supra,* at 311; *Thornhill v. Alabama,* 310 U.S. 88, 105. 368 U.S. at 202-03.

Thus, broad "breach of the peace" statutes of reasonable construction are not unconstitutional *on their face.* However, they may well be unconstitutional *as applied* even though the activity to which they are applied might be constitutionally proscribed by a specific statute enacted in support of an overriding state interest.

Examining California Penal Code § 415 with this framework in mind, we find that section to be a reasonable legislative provision protecting the public from unforeseeable and unwarranted intrusions into the peaceful and orderly conduct of its affairs. *See United States v. Woodard,* 376 F.2d 136, 140-41 (7th Cir. 1967). State appellate decisions interpreting § 415 have upheld its application only in such circumstances. *See Chrisman v. Culinary Workers' Local 62,* 46 Cal. App. 2d 129, 115 P.2d 553 (Dist. Ct. App. 1941); *People v. Green,* 234 Cal. App. 2d Supp. 871, 44 Cal. Rptr. 438 (Super. Ct. App. Dep't 1965), *cert. den.,* 382 U.S. 993 (1966); *People v. Vaughn,* 65 Cal. App. 2d Supp. 844, 150 P.2d 964 (Super. Ct., App. Dep't 1944); *People v. Anderson,* 117 Cal. App. 763, 1 P.2d 64 (Super. Ct., App. Dep't 1931). We conclude that § 415 is not unconstitutional on its face.

We so hold only on the basis that § 415 is the kind of "catch-all" found permissible by Mr. Justice Harlan in his concurring opinion in *Garner, supra.* To make this perfectly clear: § 415 cannot be employed by the state to punish exercises of the right of freedom of speech guaranteed by the First Amendment through the Fourteenth. Some very limited restrictions on that right may be reached by a narrowly drawn statute embodying a legislative judgment that they are necessary to protect the community against clear and present danger. *Garner, supra,* at 202-03 (Harlan, J., concurring), *see Cantwell v. Connecticut, supra,* at 311. No such statute is here before us.

IV.

As noted earlier, plaintiffs also move for a declaratory judgment that §§ 408, 409 and 415 have been applied without just cause for the purpose and with the effect of discouraging the exercise of free speech and assembly. There is no evidence in the record plainly establishing abusive invocation of the state criminal laws for such purposes. Although some plaintiffs have submitted affidavits making such allegations and claiming a "chilling" of their First Amendment rights, those declarations have been controverted by the defendants. The record is insufficient to warrant the granting of such relief.

Plaintiffs further seek a declaratory judgment that various regulations issued by defendant Hayakawa are invalid under the First and Fourteenth Amendments. These regulations prohibited the use of the central campus for rallies or other public events likely to disturb classes and studying. Since the filing of the complaint, however, these restrictions have been rescinded. Thus, this portion of the plaintiffs' motion is moot.

For the reasons expressed in denying any declaratory relief in this matter, we also deny the plaintiffs' request for a preliminary injunction.

V.

It is important to reiterate that our decisions on the narrow issues here before the Court do not sanction any inroad whatever by any person or persons whatever in any manner whatever upon the Constitutional rights of free speech and assembly. In these times, when issues of critical importance provoke discussion and disagreement —especially on our campuses—it is important to bear in mind what the Supreme Court said in *Terminiello v. Chicago,* 337 U.S. 1, 4-5 (1948), and reiterated in *Edwards, supra,* at 237-38, and *Cox, supra* at 551-52:

> [A] function of free speech under our system of government is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

(Citations omitted).

In accordance with the conclusions reached earlier in this opinion, it is hereby ordered that the motions for declaratory judgment and injunctive relief are denied and that judgment for the defendants be entered.

Dated: June 27, 1969.

/s/ M. Oliver Koelsch
Circuit Judge

/s/ William T. Sweigert
District Judge

/s/ Stanley A. Weigel
District Judge

Appendix B

Edward T. Mancuso
Public Defender
By: Charles G. Warner
Deputy Public Defender
850 Bryant Street, Room 205
San Francisco, California 94103
553-1671

In the United States District Court
for the Northern District of California

No. 50808

Carmen Carillo, et al.,
Plaintiffs,

vs.

S. I. Hayakawa, et al.,
Defendants.

DECLARATION OF CHARLES G. WARNER

Charles G. Warner, declare under penalty of perjury, as follows:

That he is a Deputy Public Defender for the City and County of San Francisco. That in this capacity he has been charged with the responsibility of assisting in the defense of persons arrested on the campus of San Francisco State College on January 23, 1969; that the Office of the Public Defender represents in excess of 400 of said persons arrested on misdemeanor charges in the Municipal Court for the City and County of San Francisco.

That it is your declarant's opinion that all clients represented by this Office are members of the same class as plaintiffs herein within the meaning of the Federal Rules of Criminal Procedure, and that the trials of these matters should be permanently enjoined for the reasons set forth in plaintiffs' complaint. Furthermore, this Office has requested the District Attorney for the City and County of San Francisco to continue the prosecutions of these matters until this Court adjudicates the instant law suit, but the District Attorney has refused to do so.

WHEREFORE, your declarant respectfully requests that he be allowed to file the attached Memorandum of Points and Authorities and that petitioners be granted the relief prayed for in their complaint.

DATED: March 11, 1969

EDWARD T. MANCUSO
Public Defender

By: /s/ CHARLES G. WARNER
Charles G. Warner
Deputy Public Defender

Edward T. Mancuso
Public Defender
By Charles G. Warner
Deputy Public Defender
850 Bryant Street
San Francisco, California
553-1671

In the United States District Court for
the Northern District of California

No. 50808

Carmen Carillo, et al.,
Plaintiffs,
vs.
S. I. Hayakawa, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RELIEF REQUESTED IN PLAINTIFFS COMPLAINT ON FILE HEREIN.

I

DEFENDANTS CANNOT BE CONVICTED OF SECTIONS 408, 409 and 415 OF THE PENAL CODE IN THAT THEY WERE ENGAGED IN A CONSTITUTIONALLY PROTECTED ACTIVITY.

It is defendants' contention that they cannot lawfully be convicted of Penal Code Sections 408, 409 and 415 in that they were engaged in a constitutionally protected activity at the time of their arrest. Defendants were exercising their rights of freedom of speech and freedom of assembly guaranteed to them under the First Amendment

to the United States Constitution. The First Amendment is made applicable to the states through the Fourteenth Amendment to the Constitution. *Gitlow v. New York,* 268 U.S. 652 (1925).

In *Edwards v. South Carolina,* 372 U.S. 229 (1963) the United States Supreme Court reversed convictions from South Carolina courts for disturbing the peace stating that "the

* * * *

Appendix C

Charles Stephen Ralston
Oscar Williams
Attorneys at Law
1095 Market Street
Suite 418
San Francisco, California 94103
Telephone: 861-8553

Attorneys for Plaintiffs

Of counsel:
William P. Bollow
Peter Haberfeld
Andrew Cohen
Michael S. Sorgen

In the United States District Court for
the Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
Plaintiffs,

vs.

S. I. Hayakawa, et al.,
Defendants.

[Filed May 7, 1969]

DECLARATION UNDER PENALTY OF PERJURY

We, Richard M. Sims, III, and Charles G. Warner, declare under penalty of perjury that the following statements are true to the best of our knowledge:

We were attorneys of record for Frank Alvarado, Carl Butz, Benjamin Cavanaugh, Ernest Brill, Connie Brozicevic and Laureen Chew, who were arrested on January 23, 1969 and charged with violating Sections 408, 409 and 415 of the California Penal Code.

At the trial of the above charges, which occurred from March 24, 1969 to April 17, 1969 in the Municipal Court of the City and County of San Francisco, the prosecution relied on the following witnesses:

(1) Captain George Emil of the S.F. Police Department;

(2) Sergeant Edward Epting of the S.F. Police Department;

(3) Officer William Pacheco of the S.F. Police Department;

(4) Officer John Mahoney of the S.F. Police Department;

(5) Officer John Sully of the S.F. Police Department;

* * * *

Charles Stephen Ralston
Oscar Williams
Attorneys at Law
1095 Market Street
Suite 418
San Francisco, California 94103
Telephone: 861-8553

Attorneys for Plaintiffs

Of Counsel:
William P. Bollow
Peter Haberfeld
Andrew Cohen
Michael S. Sorgen

In the United States District Court for the Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
Plaintiffs,
vs.
S. I. Hayakawa, et al.,
Defendants.

[Filed May 7, 1969]

AFFIDAVIT

I Stephen Arian, being duly sworn depose and say I am the attorney of record for the following named individuals:

George A. Bigham

Gerard R. DeSegur

Sandra E. Drake

Ronald Lee Gracia

Charles S. Crank

Don Q. Griffin

Edward G. Ilumin

Matsuo Furuyama

The above-named were arrested on January 23, 1969 and charged with violation of the California State Penal Code § 408, § 409 and § 415.

The matter came to trial on March 24, 1969 in Department 8 of the Municipal Court in and for the City and County of San Francisco, State of California, the Honorable Gerard J. Ogara presiding. Jury trial continued until April 16, 1969 at which time the Jury returned a verdict of not guilty as to each defendant and on each count.

At the trial of this matter the prosecution offered physic

• • • •

Levy, DeRoy, Geffner & Van Bourg
Attorneys at Law
45 Polk Street
San Francisco, California 94102
(415) Telephone Market 6-4919

In the United States District Court
Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
Plaintiffs,

vs.

S. I. Hayakawa, et al.,
Defendants.

[Filed May 7, 1969]

AFFIDAVIT

City and County of San Francisco
State of California } ss.

Stewart Weinberg, being first duly sworn, deposes and says:

That along with Claude Perasso of the Public Defender's Office of the City and County of San Francisco, he represented six persons who were arrested on January 23, 1969, and charged in the City and County of San Francisco Municipal Court with violation of California Penal Code sections 408, 409 and 415. Stewart Weinberg represented Linda Schuman; Jeffery Friedman represented Rosemary

Romero, and Claude Perasso represented James Queen, Charles Seeman, Megume Shimizu and Heide Smith.

At the trial which occurred from March 24, 1969 to April 14, 1969, evidence was presented that these defendants were present at an assembly which was boisterous, tumultuous and disturbed the peace of

• • • •

Charles Stephen Ralston
Oscar Williams
Attorneys at Law
1095 Market Street
Suite 418
San Francisco, California 94103
Telephone: 861-8553

Attorneys for Plaintiff

Of Counsel:
William P. Bollow
Peter Haberfeld
Andrew Cohen
Michael S. Sorgen

In the United States District Court for the Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
Plaintiffs,
vs.
S. I. Hayakawa, et al.,
Defendants.

[Filed May 7, 1969]

AFFIDAVIT

I, Stephen C. Johnson, being duly sworn depose and say I was the attorney for Stephen Canwright, Cheryl Morrow, Juanita Boles, and Michael Blaine, who were arrested on January 23, 1969, and charged in the Municipal Court of CCSF, State of California with violations of Cal. P. C. 408, 409 and 415.

At the trial which occurred from March 24, 1969 to May 1, 1969, the evidence introduced by the prosecution as indicating that these particular defendants engaged in the acts complained of fell into two distinct categories: 1) evidence relating to the actions of the particular defendants; and 2) evidence not connected with the defendants, but allowed in on various grounds including the conduct and character of the rally held on January 23, 1969, evidence of conduct of others occurring before the rally on said date, and after the arrest of defendants on January 23, 1969, and evidence of violence

• • • •

Charles Stephen Ralston
Oscar Williams
Suite 418
1095 Market Street
San Francisco, California 94103
Telephone: 861-8553
Attorneys for Plaintiffs

Of Counsel:
William P. Bollow
Peter Haberfeld
Andrew Cohen
Michael S. Sorgen

United States District Court
Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
Plaintiffs,
vs.
S. I. Hayakawa, et al.,
Defendants.

[Filed May , 1969]

AFFIDAVIT

I, James N. Penrod, being duly sworn depose and say I was the attorney for Regino Montes, Thomas D. Maxey, Leonard J. Mudavahnu, Diane Moore, Michael O'Callaghan, Jacqueline Quinn, Marilyn Uran, and Ruth Pine, who were arrested on January 23, 1969, and charged in the Municipal Court of CCSF, State of California, with violations of Cal. P. C. 408, 409, and 415.

At the trial which occurred from March 24, 1969 to April 2, 1969, the following types of evidence were introduced:

1. There was no evidence of any violence occurring before or during the rally at which these defendants were arrested. There was evidence of the presence of nine pool balls in a crowd, estimated by police witnesses to be about 1200, most of which were known by police witnesses to be in the possession of one man who, it was testified, in no way resembled the above defendants. There was also

• • • •